Thangasamy Brown a/l DN Gnanayutham v Pelabuhan Tanjung Pelepas Sdn Bhd & Anor

COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEAL NO P-04–67 OF 2004
SURIYADI, HELILIAH AND KN SEGARA JJCA
22 SEPTEMBER 2008

Labour Law — Industrial Court — Award — Judicial review — Dismissed by High Court — Appeal against dismissal — Whether appellant was employed on six months fixed term contract thereby justifying remedy awarded by Industrial Court — Whether findings of Industrial Court unreasonable

The appellant was employed as an IT advisor on a six months fixed term contract with the respondent company. The terms and conditions of employment were set out in the appellant's letter of employment dated 10 May 2000, which was duly signed and accepted by the appellant on 1 June 2000. According to the terms of employment the appellant's contract of employment was to commence on 1 July 2000 and expire on 31 December 2000 unless terminated by either party serving one month written notice. After three months into the contract, the appellant tendered his resignation vide his letter dated 25 September 2000 'the resignation letter'. In the resignation letter the appellant claimed that he had been constructively dismissed by the first respondent with effect from 25 September 2000. The appellant's allegation of constructive dismissal was referred to the Industrial Court ('the IC'), the second respondent. The IC found that the appellant had suffered deplorable acts of victimisation at the hands of the first respondent's IT division general manager and held that the appellant had been constructively dismissed without just cause or excuse. Thus, the IC awarded the appellant compensation consisting of the remuneration that the appellant would have earned for the balance period of the six months contract together with an exemplary compensation, equivalent to three months remuneration. The total sum awarded to the appellant was RM71,880. The appellant applied for judicial review of this award. He claimed that he was employed on a permanent contract of employment and that therefore the compensation awarded to him by the IC ought not to be limited to the balance of the contract period. The High Court dismissed the appellant's application for judicial review with costs and this was the appellant's appeal against that decision. The sole issue for determination in this appeal was whether the appellant was employed on a six month fixed term contract thereby justifying the remedy awarded by the IC.

Held, dismissing the appeal with costs:

(1) The High Court judge had correctly approached the matter in judicial

review with a view to discover any procedural impropriety, illegality or irrationality on the part of the IC in arriving at the decision and the award, so as to have exceeded its jurisdiction (see para 6).

(2) The IC's findings of facts and law did not demonstrate a decision so unreasonable that no reasonable authority could ever have come to it. Premised upon the oral and documentary evidence before it, the IC came to the conclusion that the appellant was employed on a fixed term contract. As the parties had agreed to a term of six months employment, the IC saw no reason to add to or vary the said agreement in writing. Having found the appellant engaged for a fixed term period of six months, the IC awarded compensation accordingly (see para 12).

[Bahasa Malaysia summary

Perayu telah bekerja sebagai penasihat IT bagi tempoh tetap enam bulan dengan syarikat responden. Terma-terma dan syarat-syarat pekerjaan dinyatakan dalam surat pekerjaan perayu bertarikh 10 Mei 2000, yang ditandatangani dan diterima oleh perayu pada 1 Jun 2000. Menurut terma-terma pekerjaan, kontrak pekerjaan perayu bermula pada 1 Julai 2000 dan tamat pada 31 Disember 2000 kecuali ditamatkan oleh salah satu pihak melalui notis bertulis satu bulan. Selepas tiga bulan di dalam kontrak tersebut, perayu mengemukakan peletakan jawatannya melalui surat bertarikh 25 September 2000 ('surat peletakan jawatan'). Dalam surat peletakan jawatannya, perayu mendakwa bahawa dia telah dibuang kerja konstruktif oleh responden pertama berkuat kuasa dari 25 September 2000. Dakwaan perayu bagi pembuangan kerja konstruktif telah dirujuk kepada Mahkamah Perindustrian ('MP'), responden kedua. MP mendapati bahawa perayu mengalami perbuatan buruk iaitu penganiayaan di tangan pengurus umum bahagian IT responden pertama dan memutuskan bahawa perayu telah dibuang kerja konsrtuktif tanpa sebab atau alasan yang adil. Oleh itu, MP mengawardkan pampasan perayu iaitu gaji yang sepatutnya diterima oleh perayu bagi baki kontrak enam bulan bersama-sama dengan pampasan teladan, bersamaan dengan tiga bulan gaji. Jumlah wang yang diawardkan kepada perayu adalah RM71,880. Perayu memohon untuk semakan kehakiman award ini. Dia mendakwa bahawa dia bekerja di bawah kontrak pekerjaan yang tetap dan bahawa dengan itu, pampasan yang diberikan kepadanya oleh MP tidak sepatutnya terhad kepada baki tempoh kontrak. Mahkamah Tinggi menolak permohonan perayu untuk semakan kehakiman dengan kos dan ini adalah rayuan perayu terhadap keputusan tersebut. Isu untuk diputuskan dalam rayuan ini ialah sama ada perayu telah berkerja atas kontrak tempoh tetap enam bulan dan dengan itu memberi justifikasi award yang diberikan oleh MP.

Diputuskan, menolak rayuan dengan kos:

(1) Hakim Mahkamah Tinggi betul dalam mendekati perkara tersebut

dalam semakan kehakiman dengan tujuan untuk menemui mana-mana prosedur yang tidak betul, tak sah atau tidak rasional pada MP dalam memutuskan keputusan dan award, telah melebihi bidang kuasanya (lihat perenggan 6).

(2) Penemuan fakta-fakta dan undang-undang IC tidak menunjukkan keputusan yang tidak munasabah bahawa tiada pihak berkuasa yang munasabah yang akan memutuskannya. Berlandaskan kepada keterangan lisan dan dokumentari sebelum ia, MP menyimpulkan bahawa perayu telah bekerja di bawah kontrak tempoh tetap. Oleh kerana pihak-pihak telah bersetuju untuk tempoh enam bulan pekerjaan, MP merasakan tiada sebab untuk menambah kepada atau mengubah perjanjian tersebut secara bertulis. Setelah diputuskan perayu diambil berkerja untuk tempoh enam bulan tetap, MP mengawardkan pampasan sewajarnya (lihat perenggan 12).]

Notes:

For cases on award, see 8(2) *Mallal's Digest* (4th Ed, 2011 Reissue) paras 1556–1625.

Legislation referred to

Industrial Relations Act 1967 s 20

Appeal from: Judicial Review 25–5 of 2003 (High Court, Pulau Pinang)

B Lobo (Raveen & Associates) for the appellant.
S Nantha Bala (Zul Rafique & Partners) for the respondents.

KN Segara JCA:

[1] The appellant is a Malaysian citizen, 54 years of age, possessing academic qualifications in engineering and law. He was employed by the first respondent company as an IT advisor on a six months fixed term contract with effect from 1 July 2000. The terms and conditions of employment are found in the appellant's letter of offer of employment dated 10 May 2000. The appellant accepted the offer of employment on the said terms and conditions and duly signed the acceptance on 1 June 2000. Barely three months into the contract, by letter dated 25 September 2000, the appellant tendered to the first respondent company his resignation, claiming that he had been constructively dismissed.

[2] The relevant terms of the fixed term employment relating to the period of the contract, salary and termination of employment appear in the letter of offer at cll 1, 2 and 9 which reads:

1. PERIOD OF CONTRACT

This contract of employment shall be for a period of six (6) months commencing from 1st July 2000 and will expire on 31 December 2000, unless terminated earlier by either party by giving notice in accordance with the provision of article 9 of this agreement.

2. SALARY

Your basic salary will be RM9,000.00 per month.

3. ANNUAL LEAVE

4. WORKING HOURS

5. EMPLOYEES' PROVIDENT FUND

6. MEDICAL BENEFITS AND HOSPITALISATION

7. COMPANY CAR

8. BONUS

9. TERMINATION OF EMPLOYMENT

During the validity of this contract either party may terminate this contract of employment by serving one (1) month written notice or the payment of one (1) month salary in lieu thereof.

10. CODE OF CONDUCT

11. COMPANY'S RIGHT TO AMEND

12. MEDICAL CHECK-UP

[3] The dispute between the appellant and the first respondent company arises from a representation for unfair dismissal made by the appellant under s 20 of the Industrial Relations Act 1967 in respect of his constructive dismissal by the first respondent company with effect from 25 September 2000. The minister referred the dispute to the Industrial Court, the second respondent herein.

[4] On 30 December 2002 the Industrial Court handed down its award and held that the appellant was constructively dismissed without just cause or excuse. The Industrial Court also made a finding of fact that the appellant was engaged for a fixed term period of six months and ordered that the appellant be compensated with the remuneration that he would have earned for the balance period (three months) of the six months contract, as well as a further three months remuneration as exemplary compensation for the first respondent's conduct, which the Industrial Court found to be deplorable acts of victimisation of the appellant, at the hands of first respondent's General Manager of the IT Division. The total sum awarded to the appellant was RM71,880. The first respondent paid the said sum of RM71,880 in compliance of the award but the appellant sought to quash this part of the award by an application for judicial review in the High Court, Penang.

[5] On 19 May 2004, the High Court dismissed the appellant's application for judicial review with costs and upheld the Industrial Court's award for the appellant's constructive dismissal by the first respondent. The appellant now appeals against that decision.

[6] We are satisfied that the learned High Court judge was clearly mindful of the fact that the proceedings before him was not in the nature of an appeal to review the findings of the Industrial Court. He had correctly approached the matter in judicial review with a view to discover any procedural impropriety, illegality or irrationality on the part of the Industrial Court in arriving at the decision and the award, so as to have exceeded its jurisdiction. We are unanimous there is no merits in this appeal before us.

[7] The finding of constructive dismissal without just cause or excuse of the appellant made by the Industrial Court was neither the subject matter of judicial review before the High Court nor the subject of appeal before us. Therefore, the facts leading to the constructive dismissal of the appellant shall not be adverted to in this judgment.

[8] The crux of the issue for determination in this appeal is whether the appellant was employed on six month fixed term contract thereby justifying the remedy awarded by the second respondent and not the remedy of reinstatement.

[9] The appellant claimed that he was employed on a permanent contract of employment and therefore the compensation awarded to him by the second respondent ought not to be limited to the balance of the contract period.

[10] The appellant's claim that he had been employed as a permanent employee with the right to full security of tenure as a regular employee of the first respondent rather than an employee engaged for a fixed term of six months had been very carefully considered and analysed by the Industrial Court. Premised upon the oral as well as documentary evidence before it, the Industrial Court ultimately came to the conclusion that the appellant was employed on a 'fixed term contract'. There were negotiations between the appellant and the first respondent's top management. There was an agreement reduced into writing and the parties had agreed to a term of six months employment. The Industrial Court saw no reason to add to or vary the said agreement in writing. The Industrial Court in its award, inter alia, stated:

> The six-month term is expressly stated in the offer of employment. It was accepted unreservedly by the claimant when he appended his signature accepting the contents of the terms and conditions of employment. The court sees no reason to go

beyond the terms of the letter of offer which was the ultimate expression of the contractual intent of the parties who for all intents and purposes were negotiating at arms length.

[11] The Industrial Court further stated in its award:

From the purpose of the claimant's employment, the nature of work the claimant was doing and the situation that the company was under, the court accepts the evidence of the DCEO (COW4) and finds the claimant's appointment was to give the company's IT division continuity in support of Yasmin/CMC IT system as the company was concerned that there should be someone on top of the situation. The company found that person in the claimant. The company's top management may well have expressed to the claimant their dissatisfaction with the performance of the GM of the IT Division. They might have even wished him away and the Claimant might have entertained thoughts of taking over the said GM's position or leading the company in the implementation of its vision for the IT Division over the years to come, but that is not the same as offering the claimant the GM's job or offering the claimant permanent employment when there was no vacancy for the GM's position or some other permanent post to be filled. Mere representation of possibilities inter alia that the claimant will have a good chance for promotion and long term job security do not transform themselves into terms of a contract of employment, much less fundamental terms contradicting the express words of the contract except in cases where there is a cogent case of promissory estoppel or collateral contracts pleaded and proven by the claimant.

The court is of the view that the claimant's case that he had a legitimate expectation to regular employment with full security of tenure as he was lured into the company while he was still with Yasmin and he had in consequence thereto given up his job with Yasmin does not stand up to careful scrutiny. The claimant was not an employee under a contract of service with Yasmin. His company, Cergas, had a contract to provide the services of a project manager for a term of 18 months for the IPTMIS project. The said contract was expiring and there is scant evidence that there was going to be another contract between Yasmin and Cergas. … The claimant was not giving up a secured employment at a superior salary and terms and conditions as alleged but rather was negotiating for a position in thecompany when his company's (Cergas') contract with Yasmin had expired. To put it plainly, the claimant cannot be said to have given up the security of tenure he claimed to have had with Yasmin for the six-month contract which he was offered by the company.

...

...

The court holds that the claimant was engaged by the company for a fixed term period of six months.

[12] We are unanimous that the Industrial Court's careful analysis of the evidence as well as the findings of facts and law does not demonstrate a decision so unreasonable that no reasonable authority could ever have come to it. The

Industrial Court's decision on the issue of fix term contract is consistent with established principles of law. Having found that the appellant was engaged for a fixed term period of six months (commencing 1 July 2000–31 December 2000) and the contract terminating by effluxion of time on 31 December 2000, there is no question of reinstatement, but only compensation to be considered by the Industrial Court for the premature termination arising from the constructive dismissal which occurred on 25 September 2000. In the circumstances, we are unanimous that the Industrial Court correctly awarded compensation consisting of the remuneration the appellant would have earned for the balance sum of the contract together with an exemplary award, equivalent to three months remuneration, for the first respondent's conduct (that is, the company's General Manager of the IT Division) towards the appellant which contributed to the appellant's resignation on 25 September 2000.

[13] We are unanimous the appeal be dismissed with costs. The decision of the High Court is affirmed and the award of the Industrial Court upheld. Deposit towards taxed costs of the first respondent.

Appeal dismissed with costs.

Reported by Kohila Nesan